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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1954. No.

JOSEPH LOMBARDI, et al., trading as JOSEPH LOMBARDI & SONS,
Petitioners,

vs.

JOHN R. KEEFER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph Lombardi & Sons pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above case on January 14, 1954, with rehearing denied on February 26, 1954.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Philadelphia County is unreported. The Opinion of the Supreme Court of Pennsylvania is reported in 376 Pa. 367.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on January 14, 1954 (R. a) and the petition for rehearing was denied on February 26, 1954 (R. a). The jurisdiction of this Court is invoked under 28 U. S. C. section 1257(3). The federal questions were first raised at trial, and the Trial Court refused to grant the relief requested thereunder (R. a). The propriety of the Trial Court's refusal was raised in the Petitioner's appeal to the Supreme Court of Pennsylvania and the said court affirmed the action of the Trial Court.

QUESTIONS PRESENTED.

Where the state court has once interpreted the contract in question, does not that interpretation become a part of the contract and any subsequent change in that interpretation to the injury of a contracting party impair the obligation of the contract?

May the power of state courts be exercised to take away rights that have been acquired by contract and have come under the protection of the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED.

Article I, section 10 of the Constitution of the United States which in part provides:

"No State shall * * * pass any bill * * * or law impairing the obligation of contracts * * *."

Article XIV, section 1 which in part provides:

"nor shall any state deprive any person of * * * property, without due process of law,"

STATEMENT.

This was an action in assumpsit on the indemnity clause of a contract between the Petitioners and the City of Philadelphia which was entered into on May 11, 1949. The plaintiffs were the respondents, here who sued the Petitioners under the contract in the status of *third party beneficiaries* of it and alleged damages to their real estate caused solely by the construction of a sewer abutting their properties. All prior interpretations of the indemnity clause in identical contracts provided that claims thereunder must be submitted to arbitration by the City Engineer and that negligence of the contracter must be established in order to recover damages.

The Petitioners denied liability for the damages on the grounds that negligence had neither been alleged nor proven and that the Respondents' claims had not been submitted to the city engineer under the appropriate mandatory provisions of the contract. The jury rendered verdicts for the plaintiffs which were affirmed by the Supreme Court of Pennsylvania.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:

1. In applying the doctrine of absolute liability for blasting against the Petitioners.

2. In imposing under the indemnity clause of the contract with a municipality an insurers' liability upon the petitioners for acts of the employees of the municipality.

3. In holding that the provisions relating to the submission of claims to the city engineer were not mandatory under the rulings and decisions of the Supreme Court of Pennsylvania enunciated prior to May 11, 1949.

4. In affirming the Court of Common Pleas of Philadelphia County.

REASONS FOR GRANTING THE WRIT.

1. Petitioners have been denied rights which were established under prior interpretations of a contract when the Supreme Court of Pennsylvania changed that interpretation after the contract had been entered into and fulfilled by the Petitioner.

2. Petitioners relied on interpretations of an identical contract when entering into the contract in question, and

included therein was a right to be free of liability without fault or negligence and a right to have all claims for damages submitted to an engineer for arbitration.

3. The decision of the Supreme Court of Pennsylvania has denied to the Petitioner valuable rights which is contrary to the provisions and guarantees of the Constitution of the United States,

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE N. LOMBARDI,
Counsel for Petitioners.

JOHN MARTIN DOYLE,
Of Counsel.

ARGUMENT.

No absolute liability can be applied to the contract in question under prior interpretations of its clauses.

Prior to May 11, 1949, the Courts of Pennsylvania enunciated the rule that a contractor working for a municipality was not subject to an application of the doctrine of absolute liability for damages caused by blasting. In *Hirsch vs. McGovern, Inc.*, 100 Pa. Superior Ct. 1, the court rejected the doctrine of absolute liability for blasting. The Supreme Court of Pennsylvania applied the doctrine of absolute liability for blasting damage for the first time on June 24, 1949, six weeks after the contract in question was entered into when it decided the case of *Federoff vs. Harrison Construction Co.*, 362 Pa. 181.

Two questions are now presented: First, may the Supreme Court of Pennsylvania apply the doctrine of absolute liability to any municipal contract, or are they limited, as Petitioner contends to apply it against only those contracts executed after its decision in *Federoff vs. Harrison Construction Co., supra,* and second, may the "indemnity clause" of the instant contract be construed as meaning the contractor has an insurer's liability for blasting damage, when that same construction of the "indemnity clause" was rejected in *Hirsch vs. McGovern, Inc., supra; Stork vs. City of Philadelphia,* 199 Pa. 462 and *Flynn vs. City of Philadelphia,* 199 Pa. 476, these interpretations of the terms of the contract were the only interpretations existing when the contract in question was entered into.

The case of *Baier vs. Glenn Alden Coal Co.,* 332 Pa. 561 relied on by the Supreme Court of Pennsylvania in its decision in the instant case does not control these issues because in that case the coal company defendant assumed liability for the right to dig and place a shaft in the city street—it assumed liability as the price of an easement, a *quid pro quo.* In the instant case no such situation existed; the construction was for the city of Philadelphia alone, and no easement was granted to the contractor.

Nor does the case of *Del Pizzo vs. Middle West Construction Co.,* 146 Pa. Superior Ct. 345 which was also relied on by the court, bear any weight in the meaning of the contract in question here. The terms in that case relating to blasting differ essentially and materially from the terms in the instant contract in the following manner:

Blasting Provisions in Instant Case:	Blasting Provisions in Pizzo case (Record p. 36):
Section 17 of the Standard Contracts Requirements: "If any blasting is involved in the performance of this contract * * * (contractor shall deliver to the fire marshal) * * * a public liability policy in standard form covering damages to property."	"Blasting shall be conducted only where permitted by the Director and shall not be done so as to endanger persons or property and the contractor shall be held responsible for and make good any damage caused thereby."

The indemnity clause of the contract was interpreted in the two companion cases of *Flynn vs. City of Philadelphia, supra,* and *Stork vs. City of Philadelphia, supra.* The *Flynn* case provided that the indemnity clause did not make the contractor liable for mistakes of the city engineer or for following his instructions, and the *Stork* case holds that where property is damaged by a contractor following specifications of a city contract, a verdict against the city in favor of the claimant is proper. Proceedings against the city are ordinarily initiated by Board of View proceedings, and such proceedings are the proper and only remedy. *Hasting's Appeal,* 374 Pa. 120 (May 27, 1953).

The provisions of the contract in question concerning the status and authority of the city engineer is section 29 of the Standard Contract requirements, which, in speaking of the engineer say, "* * * He shall determine all other questions that may arise in relation to the execution of the work * * *." This provision has been interpreted as being mandatory. Mr. Justice Drew, speaking for the Court in the case of *Canuso vs. City of Philadelphia,* 326 Pa. 302, said:

> "The work was to be done under the general direction of the Director of Public Works of the City of Phila-

delphia whose decision 'on any questions arising in connection with the performance of (the) contract shall be binding and conclusive upon the parties.' "

And again:

"The jurisdiction of the arbitrator extended to 'any question arising in connection with the performance of (the) contract.' His authority was broad."

The Pennsylvania Arbitration Act of April 25, 1927, P. L. 381; 5 Purdons Stats., Anno., 176, provides that its provisions shall be applicable to any written contract to which the Commonwealth of Pennsylvania or any political subdivision thereof shall be a party. This provision of the act has been held to be mandatory in all cases. *Acchione Construction Co. vs. Com. of Pennsylvania*, 347 Pa. 562.

The Supreme Court of Pennsylvania by broadening the interpretation of the indemnity clause of the contract in question in this case gave effect to a rule enunciated after the contract had been entered into and thereby applied a doctrine of law to the interpretation which retroactively overruled the existing law concerning the meaning of the indemnity clause as it was enunciated in the cases of *Hirsch vs. McGovern, supra; Flynn vs. City of Philadelphia, supra; Stork vs. City of Philadelphia, supra,* and *Canuso vs. City of Philadelphia, supra.*

In *Hirsh v. McGovern,* supra, the plaintiffs' house was damaged by blasting for a subway in the street. The rule in Pennsylvania was stated by Cunningham, J., as follows (at p. 5):

"The rule by which this question must be determined is well established. If such injuries resulted from the negligence of the municipality, or its contractor in the performance of the work, the remedy is by an action

of trespass against the municipality or the contractor, as the case may be, based upon such negligence, but, if the injuries were the direct, immediate and necessary or unavoidable consequences of the act of eminent domain, no matter how carefully performed, the remedy is against the municipality and ordinarily by proceedings before a board of view."

In *Federoff v. Harrison*, the Supreme Court of Pennsylvania held a contractor liable for injuries due to blasting, although the work was done without negligence. The new rule was stated by Linn, J., as follows (at p. 183), in the language of Section 519 of the Restatement of Torts:

> "One who carries on an ultra-hazardous activity is liable to another whose person, land, or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm."

The "Law" announced by Judicial Decision is equivalent to an Act of the Legislature.

It is only accepting a realistic view if we acknowledge that the decision of a Court can make or change the law, and is not merely declaratory of what the law, in theory, has always been.

This Court adopted this view, in the face of a century of precedents, when it overruled *Swift vs. Tyson*, 16 Peters 1 (10 Lawyers Ed. 865), in the case of

Erie Railroad Company v. Tompkins, 304 U. S. 64 (1938), 82 L. Ed. 1188,

in which this Court held, by Brandeis, J.:

> "The phrase 'laws of the several states' in the provision of Sec. 34 of the Federal Judiciary Act of September 24, 1789, chap. 20, 28 U. S. C. sec. 725 * * * cannot constitutionally be construed as excluding in matters of general jurisprudence the unwritten law of the state as declared by its highest court."

Swift v. Tyson, 16 Peters 1 (10 L. Ed. 865) overruled. Reed, J. concurring (at p. 91) said:

> "To decide the case now before us and to 'disapprove' the doctrine of Swift v. Tyson requires only that we say that the words 'the laws' include in their meaning the decisions of the local tribunals."

Accordingly, the change of decision by the Supreme Court of Pennsylvania in the case at bar, was a "law" impairing the obligation of the petitioners' contract.

Respectfully submitted,

HORACE N. LOMBARDI,
Counsel for Petitioners.

JOHN MARTIN DOYLE,
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